No. 161

IN THE

Supreme Court of the United States

October Term, 1958

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Petitioner,

—v.—

KENTUCKY FINANCE COMPANY, INC. and KENTUCKY DISCOUNT, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

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Opinions Below

The opinion of the District Court (R. 82-84) is reported at 150 F. Supp. 368. The opinion of the Court of Appeals (R. 356-361) is reported at 254 F. 2d 8.

Jurisdiction

The judgment of the Court of Appeals was entered April 15, 1958. The petition for a writ of certiorari was filed July 9, 1958, and was granted October 13, 1958 (R. 361). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

Question Presented

Whether respondents' small loan office, licensed under the laws of Kentucky and catering to residents and persons employed in the Louisville, Kentucky area, which meets each of the tests and the definition of a retail service establishment enumerated in Section 13(a)(2) of the Fair Labor Standards Act, qualifies for exemption as provided in said section. A subsidiary question is whether the clear language of the amended section showing the Congressional intent should be overridden by some of the legislative comments susceptible of a different construction.

Statute Involved

Section 7 of the Fair Labor Standards Act of 1938 as amended requires payment of overtime compensation to employees engaged in commerce, or in the production of goods for commerce. Section 13(a)(2), the construction of which is involved in this action, insofar as material is as follows:

> "The provisions of section 6 and 7 shall not apply with respect to * * * any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry * * *."

Statement

Petitioner appeals from a decision of the Court of Appeals for the 6th Circuit dismissing petitioner's complaint in an action for an injunction to restrain respondents' alleged violations of the Fair Labor Standards Act.

Rejecting petitioner's contention that the tests provided by Section 13(a)(2) may be applied only to a restricted category of businesses, the Court below held respondents' small loan office to be an exempt establishment because it met each of the tests and conformed to the "clear and unambiguous" definition of a retail service establishment provided by said exemption section. This, because more than 50% of the annual dollar volume of its loans were made within the State of Kentucky, none was for resale, and the establishment was recognized in the financial industry, of which it is a part, as rendering retail services (R. 358-60).

Respondents' establishment caters to consumer needs, at a local retail level.

The facts respecting the operations carried on at respondents' small loan office in Louisville, Kentucky, are covered by stipulations of the parties. Respondents conceded that their seven full-time and two part-time employees were covered by the overtime provisions of the Fair Labor Standards Act and that the Act had been violated, unless they were exempt under Section 13(a)(2) as employees of a retail service establishment (R. 6-14; 16-18).

Kentucky Finance, one of the respondents, is licensed under the Kentucky small loan law (KRS Chapter 288) to, and does, make personal and chattel loans ranging from $5.00 to $300.00 (R. 7-8, 82). These loans, which average slightly over $200.00 (R. 28), are all made *over the counter*

at respondents' office (R. 8), principally to laborers and clerical workers (R. 28) more than 90% of whom live in Kentucky (R. 10). Life insurance is made available to cover the amount of the loan (R. 40-41).

The money is used for consumer and household purposes (R. 28-29) for which the borrowers generally cannot get credit from other types of lenders (R. 40):

> "* * * for household needs such as food bills, medical, dental bills, hospital bills * * * school expenses * * *. A good percentage is also loaned to pay already existing * * * obligations, to retail establishments such as grocery stores, furniture stores, and so forth" (R. 28).

Kentucky Discount, the other respondent, purchases from appliance and furniture retail dealers conditional sales contracts covering such items as television sets, washers, stoves and refrigerators (R. 9, 29, 82). Except for three occasions, the contracts were purchased on an individual basis (R. 29, 33-34). Because the consumer is treated as the borrower, it is his credit that is investigated, and not the dealer's, and, based on appraisal of the consumer's credit, Kentucky Discount rejected as many as 25% of the contracts offered (R. 9, 29-30). Contracts are sometimes accepted with recourse to the retail dealer, largely to prevent fraudulent misrepresentation as to the terms of the sale (R. 31-32). While it pays the retailer for the purchase price of the commodity, Kentucky Discount *receives the installment payments directly from the consumer* (R. 30).

The Court of Appeals summed up respondents' activities by stating "that the two appellants constituted a single business unit engaged in the loaning of money to individuals for their use in paying for goods that they consumed * * *" (R. 358).

Thus, both the personal loans made—which account for approximately 60% of the dollar volume of the business—and the installment contract loans were solely for the per-

sonal needs of the ultimate consumer. None of these loans can be considered as having been made for "resale", none for re-lending to others, and none for business purposes (R. 29, 82).

Respondents' office recognized in financial industry as retail establishment.

The evidence in the *Household* case,* the first of the three test cases mentioned in the opinion below, was by stipula-

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* *Mitchell* v. *Household Finance*, 208 F. 2d 667, reversing *Tobin* v. *Household Finance Corp.*, 106 F. Supp. 541. There, the Court of Appeals for the Third Circuit reversed the trial court's finding on coverage and, therefore, did not reach the retail exemption issue (208 F. 2d, at 672). The Trial Court had found that within the financial industry small loan companies were recognized as retail institutions but held that this was not controlling because Household's services were not susceptible of classification as "'retail services'" (106 F. Supp. 546).

In *Aetna Finance Company* v. *Mitchell*, 144 F. Supp. 528, aff'd. 247 F. 2d 190 (CA 1) the Trial Court, followed District Judge Kirkpatrick in *Household*. It, too, found that the Aetna small loan office met each of the three statutory tests, including the industry recognition test, but this was held "not decisive" (144 F. Supp. at 534).

In the instant case, the Trial Court rendered no opinion of his own, but found that "local offices of small loan companies are regarded in the financial industry as retail service establishments. However, this finding becomes immaterial in view of Conclusion of Law No. 4 * * * *" Said Conclusion states that on the authority of the trial courts in *Household* and *Aetna* respondents' establishment none the less was "not a retail or service establishment within the meaning of the exemption * * *" (R. 83).

Such holding, if upheld, would defeat the chief purpose of the 1949 amendment—to provide a definition. "It is our desire," said the Senate sponsor, Senator Holland, "to clarify entirely the status of retail and service establishments by defining them, and letting them know beyond any peradventure of a doubt, whether and when they are in fact exempt * * *" (95 Cong. Rec. 12491). A definition of a retail service establishment which requires a preliminary finding of susceptibility to application of the definition is not a definition. A definition which is "not decisive" is likewise no definition.

The Court of Appeals in this case refused to follow Judge Kirkpatrick's and petitioner's interpretation. In the only case, since

tion made part of the record here (R. 13) and consisted in part of expert testimony by these leaders in the *finance field*:

> *Leon Henderson*, economist and for several years head of the Department of Remedial Loans of the Russell Sage Foundation with a background of experience in finance and Government as well as in the small loan field (R. 113 ff.), who had supported the enactment of the uniform small loan law;
>
> *Elmer Schmus*, cashier and vice-president of the First National Bank of Chicago—a leading supplier of credit to small loan companies—and the leading banking authority in the small loan field (R. 143 ff.); and
>
> *Joseph P. Dreibelbis*, head of the banking department and vice-president of Bankers Trust Company of New York, and who, as General Attorney to the Board of Governors of the Federal Reserve System, had researched and drafted "Regulation W" as a war-time measure to control the volume of retail sales by restricting the volume of retail credit (R. 152 ff.).

These experts, each speaking from the point of view of one or more segments of the finance industry, demonstrated that the small loan business is a part of the financial industry (R. 120, 146, 155), that for a long time there has existed a well-recognized distinction between wholesale and retail lending in that particular industry (R. 124, 148, 156), and that small loan companies are, and long prior to 1938 were, regarded as retail service businesses within that particular industry (R. 140, 147, 156).

Based on his experience, commencing with his work with the Russell Sage Foundation, and the studies made in

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decided, a trial court followed the 6th Circuit herein rather than the 1st Circuit's holding in *Aetna Dykes* v. *Atlas Finance Company, Inc.* and *O'Brien* v. *Atlas Finance Company, Inc.*, U. S. D. C., S. D. Ga., decided September 4, 1958.

connection therewith, Mr. Henderson found a "commonly recognized difference between the financial instrumentalities which are wholesalers and the instrumentalities which are retailers" (R. 124).

The distinction is between those which extend credit to business and those which extend credit to consumers for their personal needs (R. 124). The size of the loan and the purpose for which it is used are criteria, but

> "the ultimate test was whether * * * the credit or the loan was to the individual for consumptive purposes" (R. 124).

In his dealings with commercial banks, Mr. Henderson was often told that they were "wholesalers of credit" (R. 125) and he recalled numerous discussions on the subject of retail financing with bankers, state banking officials, governors of several states and representatives of such organizations as Chambers of Commerce and Better Business Bureaus (R. 126; Court Exhibit 1, *Household* record pp. 68-9a).

When asked whether a small loan business is considered similar to rather than identical with other retail businesses, Mr. Henderson replied:

> "Well, in my opinion they are identical. When I was dealing with this thing I would be talking about the retail company in the small loan business * * * that what you needed was a retailer who had the same kind of attitude towards his customer and dealt with him in the same kind of way as the other retail institutions in the town, * * * the small loan companies would be in the available, the downtown shopping areas, they would use generally the same media of communication, they dealt with the same customers and they were offering service instead of goods" (Court Exhibit 1, Household Rec. p. 134a; see also, R. 211-212).

Mr. Henderson cited numerous writings in the financial industry to support his expert opinion on the views of the industry, some examples of which are set forth in the accompanying footnote.*

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* From a pamphlet issued by the Boston Better Business Bureau in 1937:

> "The price you must pay to borrow money is of primary concern. It is well, therefore, to understand in the beginning that the rate for a small loan is, of necessity, higher than that charged for a commercial loan by a bank. One reason is that the lenders of large sums wholesale money while the lenders of small sums retail it" p. 4 (R. 135).

From a pamphlet, entitled "Credit For Consumers," published by the Public Affairs Committee:

> "Any consumer who bought flour by the carload would get a load price, but no consumer wants wholesale lots. The householder wants only a few pounds delivered at her home or her neighborhood store. Similarly, the consumer wants credit in small lots to fit his circumstances, and as with flour or coal or cotton cloth, he may pay more at retail than at wholesale" p. 25 (R. 69).

From "The Licensed Lender" by Edgar F. Fowler, published in March, 1938:

> "Commercial banks are wholesalers of cash—except where they operate small loan departments—while personal loan companies are retailers" p. 132 (R. 132).

From "The Personal Finance Business in New York," published by the New York Association of Personal Finance Companies in 1937:

> "In retailing $1,000,000, the small loan company must interview 22,700 applicants" p. 7 (R. 128).

A more recent publication of the New York State Consumer Finance Association in 1950 entitled "A Look at the Consumer Finance Business in New York State" states:

> "The fundamental reason why these charges are higher * * * is that it costs more to grant retail credit than wholesale credit" p. 14 (R. 128).

The Government introduced as an exhibit in this case an excerpt from a book—1952 edition—authored by Dr. Phelps, entitled "Financing the Installment Purchases of the American Family," as showing absence of the term "retail financing." However, the 1953 edition by the same author, at page 103, contains the following:

> "Finance Companies—*Wholesale financing* is furnished to finance the current wholesale purchases from manufacturers

And it should be noted that use of the terms "wholesale" and "retail" with respect to the financial industry is not restricted to official or technical publications. An article in the recent—January 12, 1959—issue of LIFE MAGAZINE dealing with the proposed merger of Morgan & Co. with Guaranty Trust Co. of New York states:

> "Like Morgan, Guaranty is primarily a wholesale bank, catering to corporations rather than to small individual borrowers" (p. 73).

Dr. Morris R. Neifeld, the only expert who testified personally upon the trial of this case, fully corroborated the testimony on industry recognition presented in *Household*. He is a well-known economist and lecturer on consumer finance and consumer credit. He served as a representative of the National Association of Small Loan Companies in connection with the administration of Regulation "W" (R. 43-45). Author of numerous articles on finance and consumer credit, Dr. Neifeld stated in his book, "The Personal Finance Business," *published in 1933*,

> "'Loans which are a mere fraction of the amounts granted by commercial banks, and multitudinous clerical and managerial activities make for the difference between wholesale and retail lending'" (R. 57).

At the trial, Dr. Neifeld pointed out that "[W]holesale loans are made for people who put the money to work in industry or commerce" and that loans at retail are

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by distributors and dealers, especially automobiles, home appliances, including radios and television sets, heating equipment, time and labor-saving machinery, and other articles usually sold on the installment plan.'"

"'*Retail financing* is supplied to finance the final sale of products sold on the installment plan by manufacturers, distributors and dealers, especially automobiles, home appliances, including radios and television sets, heating equipment and time and labor-saving machinery.'"

made to the "individual consumer, the money is put for the use of the family * * * The money itself does not generate income." He explained that those who are wholesalers of credit lend money to businesses or for relending to others. He listed the credit union and personal finance companies, small loan companies, and industrial loan companies as examples of retailing in the financial industry (R. 49).

He illustrated this wholesale-retail concept, as recognized in the financial industry, by contrasting a bank loan to a small loan company, with one by such a small loan company to a consumer. The former is "a wholesale loan, because they have made it to the company which in turn re-lends it to individual consumers" (R. 54). The latter loan, he stated, was "purely retail" (R. 55).

Dr. Neifeld declared that lending money is clearly a service comparable to a number of the types of services recognized by the Wage and Hour Administrator as retail services—such as rental of hotel rooms and car and boat rentals. In his view the Administrator should have no greater difficulty in regarding a small loan office as a retail service establishment than in so regarding embalming establishments, dance halls, crematories, etc. (R. 71, 72), all of which are to be found on the Administrator's list of exempt retail service establishments. (See Interpretive Bulletin No. 6.)

The witness emphasized that he was stating the industry's views, made available to him by reason of his numerous contacts with executives of financial institutions; also by his attendance at and participation in symposiums and annual meetings of such organizations as American Bankers Association, American Industrial Bankers Association, and The American Finance Conference Association (R. 45-46).

Petitioner's experts did not reflect views of the financial industry.

The Department of Labor relied on the testimony in *Household* of a Federal Reserve Board official and two Wharton School professors.

David C. Melnicoff, associated with the Federal Reserve Bank of Philadelphia, placed great reliance on the classifications in the Standard Industrial Classification Manual (R. 334, 336) and gave his definition of "retailing"— which he would not apply to a small loan office—in terms of how "the general public or the general business community would understand the word" (R. 341).

Asked if he made any effort "to ascertain the views of the financial industry * * * as to whether or not this [the small loan business] was recognized as retail in the industry," Mr. Melnicoff answered that he "was not requested to do that, sir. I was requested to come and state my opinion" (Court Exhibit 1—Household Rec. 279a).

Professor Whittlesey agreed with the views expressed by Mr. Melnicoff (R. 161), adding that:

> "as reflecting traditional attitudes on this subject * * * at institutions of business * * * such as the Wharton School, it is customary to teach Retailing in the Department of Marketing * * * so far as I know, there is no discussion of finance companies in the Marketing Department" * (R. 161).

The problem was "a new one" to Professor Whittlesey, who had never discussed it with people in the finance field (R. 159). He had difficulty considering retailing as ap-

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* See petitioner's comment conceding that his witnesses interpreted the statutory language as its terms are used "in the field of marketing and retailing" rather than in the financial field (Br., p. 7).

plicable to anything except the sale of commodities at retail (Court Exhibit 1, Household Rec. pp. 323-4a; 361-2a; see also Petitioner's Br., p. 12; R. 347). Obviously, the statute as indicated by the legislative history intended no such restriction.

Dr. Blankertz, a Professor of Marketing at the Wharton School, gave as the basis for his opinion:

> "One of our primary reliances is the American Marketing Association's Committee on Definitions, * * *
>
> We also place reliance on the Marketing Handbook, so-called, which is a basic coverage of the field. In that handbook, they give no recognition to financial institutions, which is part of my answer why they have no such recognition. They do not recognize them as being in the field of Marketing: the concept of retailing is lacking.
>
> We obviously rely on the census for many definitions we use not only as teachers but as statisticians, as researchers, and the census bureau, again, does not classify financial institutions as retailing and that is why I have so said that I did not consider them retailing" (R. 343-344).

Thus, the only evidence of the attitude of the financial industry is that offered by respondents'—as the Court of Appeals described them—"highly qualified experts in the financial industry" (R. 359-60): that small loan offices are regarded as retail service establishments "in the particular industry"—the financial industry.

Summary of Argument

Respondents conduct a local establishment whose small loan activities are regulated under the Kentucky Small Loan Law. It meets each of the three clearly defined tests of a retail service establishment set forth in the amended Section 13(a)(2) of the Fair Labor Standards Act, in-

cluding the industry recognition test. The legislative history of the original Act demonstrates that, from the very beginning, Congress intended to exempt local establishments of this type and that, in enacting the 1949 amendment, Congress desired to make certain that such intention would not be further thwarted through restrictive administrative rulings. To accomplish this purpose, Section 13(a)(2) provides definitive tests and a definition which were declared to be binding on the Administrator and the Courts.

I. *As stated by the Court of Appeals, the new exemption section is "clear and unambiguous"; the establishment herein conforms to the definition of a retail service establishment as provided by that section.*

Section 13(a)(2), as amended, defines a retail establishment to

> "mean an establishment 75 per centum of whose * * * services * * * is not for resale and is recognized as retail * * * services in the particular industry * * *."

The findings below that respondents' establishment met the percentage tests and met also the industry recognition test is based not merely on the overwhelming evidence but on the *only relevant evidence*.

As the Court below so aptly stated:

> "The evidence that it was so considered by the industry is cumulative, both in oral testimony of highly qualified experts in the financial industry and from the writings of those engaged in it. It is not in any measure refuted by those familiar with and active in the industry" (R. 359-360).

The testimony of two bankers and that of Leon Henderson, none of whom is affiliated with any small loan company, supported by an economist in the small loan field

and by the writings in the industry, overwhelmingly demonstrated that there is a concept of wholesaling and retailing in the financial industry. It also demonstrated beyond peradventure that small loan offices are recognized as rendering retail services and as retail service establishments in that "particular industry."

The Government's witnesses, on the other hand, gave their personal opinions; they made no effort to reflect the views of the industry and relied instead on publications such as the Standard Industrial Classification Manual, the Census, Marketing Hand Books, etc., which have no relevance to the question of recognition in the "particular industry." (See *Boisseau* v. *Mitchell*, 218 F. 2d 734, 738; *Mitchell* v. *Taylor Fertilizer Works*, 233 F. 2d 284, 288.)

II. *The legislative history demonstrates that Congress has always intended to exclude from coverage the purely local activities carried on by establishments such as the one here involved and amended the statute to make certain that that intention would not be further thwarted.*

(1) Congress intended "to leave local business to the protection of the states" (*Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 570).

The Senate Report on the 1938 Act states that "the bill carefully excludes from its scope business * * * that is of a purely local nature" and "leaves to state and local communities * * * those local service * * * trades that do not substantially influence the stream of interstate commerce." It declares also that it was not intended to include under the Act "purely local and small business establishments that happened to lie near state lines" and thus "serve a wholly local community trade within two states" (Senate Rep. No. 884, 75th Cong., 1st Sess., p. 5).

To insulate such local establishments as respondents' from the Act's coverage, the original Section 13(a)(2) exempted establishments "the greater part of whose selling or service is in intrastate commerce." However, because the original exemption contained no definition of a retail establishment, the Administrator proceeded to make his own definitions and his own listings, placing "personal loan companies" on his non-exempt list.

(2) *Congress amended Section 13(a)(2) in 1949 so as to provide a binding definition of a retail establishment and to overcome the narrowing effect of the administrative rulings.* The amendment was intended to "clarify" through the use of "terms in the way they are customarily understood," thus to make certain that the original Congressional intent would be carried out—that the exemption would be applied to businesses "of a purely local type which serve a particular local community and which do not send their products into the streams of interstate commerce" (95 Cong. Rec. 11,002; 12,491; 12,510).

The Senate and House sponsors repeatedly declared that the definition and tests set forth in the amended section were intended to correct the errors of the Administrator (*id.* 12,494-95, 12,497, 12,498).

Over the Administrator's protests (*id.* 12,511) they intended to provide a new definition by means of "definitive" tests, thus "making clear what is meant by retail sales, retail establishment and service establishment; so as to clear up any "doubt as to who is within the act and who is not within the act" (*id.* 11,002, 12,510, 12,519).

The statutory tests were to be controlling, so that "any sale or service [absent a resale] * * * will have to be treated by the Administrator and courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as a retail sale or service" (*id.* 12,502).

Every establishment meeting the statutory definition was to be exempt and establishments like respondents' are not to be excluded on the theory that they are "credit companies". The statutory language being clear, it should not be disregarded because of such legislative comments, as the one respecting "credit companies" whose meaning is at least doubtful. In any event, personal (or small) loan companies are not "credit companies". Regardless of how commercial credit companies may be considered, personal or small loan companies, as the proof in this case abundantly discloses, are considered retail businesses in the financial industry.

Such proof is not to be rejected on the theory, as petitioner puts it, that it is "self-serving" or "self-generating". This objection was made before the adoption of the amendment and was rejected in Congress. It has since been made in the courts and again rejected (*Boisseau* and *Taylor Fertilizer* cases, *supra.*)

In short, respondents' office is a local service business at the end of the stream of commerce, which Congress from the beginning intended to insulate from coverage under the Act; it meets the statutory tests and the Court of Appeals was wholly correct in applying the statute in accordance with its plain terms.

POINT I

Respondents' small loan office in Louisville, Kentucky, meets each of the three tests of a retail service establishment provided by the clear and unambiguous amended Section 13(a)(2).

Congress could not have been more explicit in providing in the exemption section a percentage limitation on interstate commerce and in defining a retail service establishment to

> "mean an establishment 75 percentum of whose * * * services * * * is not for resale and is recognized as retail * * * services in the particular industry * * * "

There is nothing technical or difficult about the language employed and the section " * * * is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." (*Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 618)

That "right" should not be denied the respondents who, in the event of misunderstanding, would face a general injunction "requiring them to live under pain of contempt citation." (See Mr. Justice Whittaker's dissent in *Mitchell* v. *Lublin, McGaughey & Associates, et al.*, decided January 12, 1959.)

The 5th Circuit, in *Boisseau* v. *Mitchell*, 218 F. 2d 734, declared that

> "The exemption as now phrased establishes three tests: (1) more than half of the establishment's sales or services must be made or rendered within the state where the establishment is located; (2) at least 75 per cent of the sales or services must not be for resale; and (3) at least 75 per cent of the sales or services must be recognized as retail sales or services in the particular industry' " (p. 737).

The First Circuit interpretation in *Casa Baldrich, Inc.* v. *Mitchell*, 214 F. 2d 703, was no different and the Court of Appeals in the instant case found that "[T]he language of the 1949 amendment is clear and unambiguous" (R. 360).

Applying these three tests: (1) it is undisputed that more than 50 per cent—in fact, more than 90 per cent—of respondents' services were rendered within the State of Kentucky where the establishment is located; (2) since all loans were to ultimate consumers to finance their consumer needs or their purchases of goods for personal use, there was no element of resale involved; and (3) the services performed by respondents' establishment were "recognized as retail * * * services in the particular industry."

No comment is necessary with respect to the first two of these tests. However, in view of petitioner's attacks on the significance of the finding of industry recognition, we comment briefly on the nature of the proof offered respecting the third test.

We have set forth at pages 5-10, *supra*, a summary of the expert testimony offered in the *Household* case as supplemented in this case which demonstrates that small loan offices are part of the financial industry, that in that industry there is a well defined distinction between retailers and wholesalers, and that small loan offices are and prior to 1938 were regarded as retail service establishments in the financial industry. That evidence was supported by the literature of the financial industry (see footnote, pp. 8-9, *supra*).

The Government, on the other hand, relied on "objective * * * experts"—"qualified" only in fields other than financial—and on "standard Government reports and publications" (see Br. of petitioner, p. 19)—such as Standard Industrial Classification Manual, Marketing Hand Books, the Cen-

sus, etc. Indeed, in its brief below, petitioner boasted that its witnesses

> "testified not from the point of view of the financial community but rather 'from the studies I have engaged in research and concerning shopping of people, their behavior as consumers, *they would not so recognize financial institutions of any kind as being a retailing* purchase.'" (Emphasis in original.) (Brief for Plaintiff, U. S. D. C., p. 22.)

And when, at the trial, counsel for respondents stated that the Government witnesses "did not speak from the point of view of the financial industry as the witnesses for the defendant did," petitioner's counsel replied:

> "We submit that they spoke from the standpoint of public interest" (R. 78).

But the statute calls for recognition "in the particular industry" and sponsors of the legislation repeatedly referred to recognition "in the particular industry" (95 Cong. Rec. 12,502) and spoke of the industry recognition test as "one clearly understood by both the employees and the employers in the industry involved" (*id.* 12,502).

Petitioner would have the test herein applied in accordance with classifications in the Standard Industrial Classification Manual and similar Government publications (Pet. Br. pp. 8, 54). But, as Leon Henderson indicated (Court Ex. 1, *Household* Rec. pp. 152a-3a), these classifications must be considered in light of the purposes they were intended to serve. He pointed out that the Social Security Board and the Bureau of Internal Revenue, as well as branches of the Department of Labor itself, have their own differing classifications. See *Boisseau* v. *Mitchell*, 218 F. 2d 734; *Mitchell* v. *Pascal System, Inc.*, 226 F. 2d 391 (7th Cir.).

In *Mitchell* v. *T. F. Taylor Fertilizer Works*, 233 F. 2d 284, the Fifth Circuit, in dealing with the testimony of the

petitioner's expert, stated what may well be said about expert testimony offered by petitioner in this case:

> "* * * Professor Beckman's definition may be valid for census and other purposes, but if not recognized in the fertilizer industry can have no bearing on the appellee's right to an exemption.
>
> * * * * *
>
> "The expert believed the matter governed by general definitions, which, if Congress had so intended, could have been placed in the Act itself. The fact that Congress referred the matter to industry recognition indicates that it intended a more flexible rule, adaptable to the many various branches of industry" (p. 288).

Petitioner objects to giving effect to views of an industry—that there was no intention to permit an industry to determine its status.* But Senators Holland and Taft declared that retailing was to be "defined variably in various industries by determining what are the habits and practices in the industry" (*id.* 12,510). Senator Taft added: "what is retail and what is wholesale" is "a ques-

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* This objection was one of the bases for the "qualifications" referred to in the finding on industry recognition made by the Trial Court in this case: "Subject to the same qualifications expressed by Chief Judge Kirkpatrick in Tobin v. Household Finance Corp., 106 F. Supp. 541 (D. C. E. D. Pa.), and Judge Day in Mitchell v. Aetna Finance Company, 144 F. Supp. 528 (D. C. R. I.), this Court finds that the local offices of small loan companies are regarded in the financial industry as retail service establishments" (R. 83).

Judge Kirkpatrick, with whom Judge Day concurred, stated "one of the difficulties involved in taking what an industry thinks or says about itself" was that it was possible for "any trade association to adopt a deliberate policy of calling its business a 'service' business" (p. 545 of 106 F. Supp.).

Though the Court of Appeals in *Aetna* placed major reliance on the Administrator's interpretations antedating the 1949 amendment (see 247 F. 2d 192-93), it also indicated objection to permitting an industry "to decide for itself" whether it was conducting a "retail or service establishment" (247 F. 2d at p. 193). But see legislative discussion on this subject (pp. 34-36, *infra*).

tion of fact which we are perfectly able to determine" (*id.* 12,515).

It is submitted that respondents more than sustained their burden on this "question of fact", as the trial court in each of the three test cases found. Thus, since their establishment meets each of "the three percentage requirements" and its services are recognized in the industry as retail services, respondents' employees are exempt pursuant to the amended exemption section (See *Boisseau* v. *Mitchell, supra,* at p. 739 of 218 F. 2d; *Mitchell* v. *Taylor Fertilizer Works, supra,* at page 287 of 233 F. 2d).

POINT II

The legislative history demonstrates that it has always been the Congressional purpose to exempt purely local establishments such as respondents' and that the 1949 amendment was enacted to make certain that such purpose would not be further thwarted by restrictive administrative rulings.

Since, as found by the Court of Appeals, the statutory language is "clear and unambiguous," it is sufficient for us to have demonstrated that respondents' office is a retail service establishment within the meaning of the clear language of the statute.

The Government's position is that it matters not that the language of the statute is "clear"; the Court should nevertheless look to the legislative history to find its meaning—one more consonant with the pre-1949 rulings of the Administrator. In seeking to accomplish this purpose, petitioner, using the repetitive method, urges that statements in the legislative history making reference to such doubtful terms as "credit companies" are sufficient to override the plain language of the statute.

But, legislative reports "cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms" (*United States* v. *Shreveport Grain & El. Co.*, 287 U. S. 77, 83).

However, if we do examine the legislative record, we find ample support for the Court of Appeals' appraisal of the statute; in the declarations of the sponsors who avowedly intended to "clarify entirely the status of retail and service establishments by defining them" (95 Cong. Rec. 12491) and were "simply using words and terms in the way they are customarily understood * * * going far enough to leave something definitive by this amendment" (*id.* 12510).

We shall show further from the legislative record that Section 13(a)(2) was amended in 1949 (1) to reassert the original Congressional intent to exempt local establishments; (2) to overcome administrative misinterpretations; (3) to provide a definition of retail sales and services and retail establishments, (4) that would be binding "upon the Administrator and the courts", (5-6) every establishment being eligible if recognized as retail in its industry.

(1) *Congress always intended to exclude from the Act's coverage purely local businesses such as respondents'.*

The purpose of the Fair Labor Standards Act was to make certain "that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions * * *" (*United States* v. *Darby*, 312 U. S. 100, 115). From the beginning, Congress "plainly indicated its purpose to leave local business to the protection of the states" (*Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 570), and this Court has warned that the courts "must be alert, therefore, not

to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation" (*10 East 40th Street Co.* v. *Callus*, 325 U. S. 578, 582-583).

In opening debate on the 1949 bill, Congressman Lucas prefaced his remarks by discussing the original 1938 Act and its purpose. He cited President Roosevelt's support of the

> "legislation on behalf of those 'who toil in factory,' but he also stated that 'there are many purely local pursuits and services which no Federal legislation can effectively cover'."

The Congressman then called attention to a statement on this subject by Mr. Justice Black. In discussing the original 1938 bill—as Chairman of the Senate Labor Committee—Mr. Justice Black declared:

> "that the bill was not intended to, and it did not, attempt to fix minimum wages and maximum hours in all the varied peculiarly local business units of the Nation, and that 'businesses of a purely local type which serve a particular local community and which do not send their products into the streams of interstate commerce can be better regulated by the laws of the communities and of the States in which the business units operate'—Eighty-first Congressional Record, page 7648" (95 Cong. Rec. 11002).

The Senate report on the bill which became the Act of 1938 states:

> "The bill carefully excludes from its scope business in the several States that is of a purely local nature * * * It leaves to State and local communities their own responsibilities concerning those local service and other business trades that do not substantially influence the stream of interstate commerce. For example, the policy in this regard is such that it is not even intended to include in its scope these purely local and small

business establishments that happen to lie near State lines, and solely on account of such location, actually serve a wholly local community trade within two States" (Sen. Rep. No. 884, 75th Cong., 1st Sess., p. 5).

In keeping with this purpose Section 13(a)(2) of the original Act exempted

> "* * * * any employee engaged in any retail or service establishment the greater part of whose selling or service is in intrastate commerce; * * * *"

(2) *The 1949 amendment was intended to correct the Administrator's misinterpretations and to restore the exemption as originally contemplated.*

The original exemption did not define a retail sales or service establishment. The Administrator, consequently, made his own regulations and his own lists of retail and non-retail establishments. He placed personal loan companies (not designated as "credit companies") on the non-exempt list (see 1941 Interpretative Bulletin No. 5). This pre-1949 ruling was never passed upon by the courts.

Congress became dissatisfied with the Administrator's rulings—some of which were described as having been "taken out of thin air" (95 Cong. Rec. 12500) and as having brought about a situation that was

> "far afield * * * from the original purpose of the act * * * Nothing could be clearer from a reading of the debates at the time the law was passed" (*id.* 12498).

Asked whether "our proposed amendment [will] exempt any more employees than the present retail exemption?" Senator Holland replied:

> "The answer is 'No,' insofar as concerns those who are exempted *under the proper meaning of the original act.* The answer will be 'Yes' as to some undetermined number * * * who are included in the field that has been

included within the jurisdiction of this act by interpretative rulings and by the courts in following those rulings in some cases" (*id.* 12506).*

Earlier, Senator Holland had stated:

"I may say to the Senate that one of the things which have made for trouble in this matter has been the vacillation and the change in regulations and in attitude from time to time, which we think can be corrected only by making clear what is meant by a retail sale, retail establishments, and service establishments" (*id.* 12497).

Senator Taft found that the Administrator had "steadily encroached" on the exemption. He declared:

"The senior Senator from Florida [Senator Pepper] read a statement from the Wage-Hour Administrator that 200,000 workers would be excluded from the coverage of the act by the Holland amendment. I do not think any workers would be excluded from the coverage of the act *as it was originally enacted.* It is true that the Wage-Hour Administration, with the assistance of the courts, has *steadily encroached on the exemption* which was contained in the original act relating to retail establishments. I think the figure is excessive, but it may be that if we let the law entirely alone, the Wage-Hour Administrator would succeed in including into the act not only the 200,000 mentioned, but perhaps a million more persons employed in retail establishments. That is the reason for the amendment, because what has happened has been *a steady encroachment* on the exemption * * * " (*id.* 12515).

Congressman Lucas stated that the amendment was to have

* Unless otherwise indicated, emphasis in quotations from the Congressional Record may be deemed supplied.

> "the effect of confirming the exemption for the various local neighborhood businesses whom it was the original purpose of the existing law to exempt" (*Aetna* Appx. 13).

In view of these comments, how can it be said that the amendment "was intended essentially to codify the previous administrative interpretation * * * "? (Pet. Br. p. 25.)

Nor can it be said that the legislative history shows a design to limit the exemption to such service establishments as resorts, hotels, etc. On this score, petitioner makes repeated references to the statement of Senator Holland, in which he mentions "resorts, hotels, repair garages * * * " etc., but, only in a footnote on page 43 of petitioner's brief, where the complete text of the statement appears, is it disclosed that the Senator's statement in describing retail service establishments concludes with

> "and other establishments performing local services" (*id.* 12505).

Again, petitioner claims (Br. p. 30) that when the sponsors spoke of limiting the exemption to "establishments which are traditionally regarded as retail" they meant to limit it to the types of establishments previously so classified by the Administrator.* Congressman Lucas' use of the term "traditional" should be considered in context. He said:

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* Petitioner goes so far as to urge (Br. footnote, p. 32) that "Section 16(c) of the 1949 Amending Act itself ratified the non-exempt status of the 'personal loan companies' * * *." But Section 16(c) provides that the Administrator's interpretations were to remain in effect *"except to the extent that any such order, regulation, interpretation * * * may be inconsistent with the provisions of this act * * * "* The legislative comments criticizing his rulings and the setting up of a new definition provides no blanket confirmation of the Administrator's pre-1949 rulings.

"My amendment clears up that doubt by exempting the establishments which are traditionally regarded as retail. It is only in the sense that it clarifies such doubt that my amendment can be regarded as expanding the present exemption. But in a real sense it is not expanding the exemption at all but simply confirming it for those establishments which the Congress always intended to exempt. The contrary view must assume that in granting the retail and service establishment exemption, Congress intended to reject what is *traditionally recognized as a retail sale or service in an industry and to adopt an arbitrary concept of what is retailing or servicing*" (95 Cong. Rec. 11116).

(3) *The 1949 amendment was intended to provide a definition of a retail establishment.*

The Government claims that the only purpose of the 1949 amendment was to abolish the consumer use test. That was one of the purposes, but certainly not the sole purpose. In 1949 there were two rival bills before the House: the Lesinski bill, "in substance the Administrator's recommendation" (Pet. br. p. 36) and the Lucas bill, which the Administrator opposed. By the former, confirmation was sought for "all the interpretations of the Administrator with reference to retail and service establishments" including his consumer use test (95 Cong. Rec. 11002). The Administrator opposed the Lucas bill upon the very ground that it would "substitute a completely new set of definitions of a retail or service establishment" (*id.* 12511).

But Congress rejected the Lesinski bill. Congressman Lucas stated the effect of his bill, as contrasted with the Lesinski bill, as follows:

"My bill has clarified the retail and service exemptions so that there can be no doubt as to who is within the act and who is not within the act" (*id.* 11002).

Senator Holland also emphasized the intention of providing a definition:

> "It is our desire to clarify entirely the status of *retail and service establishments by defining them, and letting them know beyond any peradventure of a doubt, whether and when they are in fact exempt* from the provisions of the law * * *
>
> It is the view of the sponsors of the amendment that it is the duty of Congress at this time, while the act is being amended, *to clarify the meaning of the terms 'retail establishment' and 'service establishment,' so that every person affected thereby, both employers and employees, including, of course, the Administrator and his staff, as well, may know who are intended to be exempted from the workings of the wage-and-hour law by the provision now proposed to be inserted in the law*" (*id.* 12491).

The Senator declared that the uncertainty of and changes in regulations required that it be made

> "clear what is meant by a retail sale, retail establishments, and service establishments" (*id.* 12497).

and

> "we are going far enough to leave something *definitive* by this amendment" that "what constitutes * * * service is defined variably in various industries by determining what are the habits and practices in the industry" (*id.* 12510).

Petitioner (Br. p. 40) states that "ironically" the test upon which we "rely * * * is the very test which the amendment proposed 'to do away with', i.e., the distinction between 'consumer' and 'business use'".

We could say the same respecting the Administrator's retreat from that test which he always—and too narrowly—applied. However, the consumer test and the industry rec-

ognition test are not mutually exclusive save that, under the amended section, the former must give way to the latter.

There is nothing strange about the fact that the financial industry view—that an office engaged in lending small amounts to consumers for consumptive purposes on a local level is a retail service establishment—rests on the same basic criteria as those advanced by the Administrator prior to 1949 and adopted by the courts in a number of cases. The difficulty lay primarily in the Administrator's arbitrary application of such criteria. By means of the device of his "susceptibility test" he was able, at will, to exclude an establishment regardless of the fact that it conformed to such basic concepts of a retail sales or service establishment.*

Congress always intended to exempt such establishments as respondents' and in adopting the 1949 amendment it went "far enough to leave something definitive" so as to insure that its original intention in this regard would be carried out.

A clear definition of retail establishments was sought to avoid discrimination between businesses where

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* In the October, 1950 Bulletin of petitioner's Wage and Hour Administrator appears the following description of a typically retail or service establishment:

> "Typically a retail or service establishment is one which sells goods or services to the general public. It serves the everyday needs of the community in which it is located. The retail or service establishment performs a function in the business organization of the nation which is at the very end of the stream of distribution, disposing in small quantities of the products or skills of such organization and does not take part in the manufacturing processes" [Sec. 779.9 sub. (d)].

It is submitted that respondents' establishment answers this description of a retail service establishment.

"* * * both are local businesses and would have equal difficulty in conforming to national wage and hour standards, both are located in the same community, and both draw employees from the same labor pool and having similar working conditions" (*id.* 12498).

Petitioner's Administrator himself recognized that "a completely new set of definitions" was being proposed by the Holland-Lucas bill. In a letter addressed to and read in the Senate by Senator Pepper, the Administrator stated:

"'The bill would *substitute a completely new set of definitions of a retail or service establishment* in place of the clear definition now recognized by the courts. Years of litigation would be required to determine how the exemption should be applied. The amendment would give rise to exceedingly difficult problems in administration, *since it is by no means clear what different industries regard as retail sales*'" (*id.* 12511).

(4) *The three tests were to be controlling.*

Senator Holland, in summing up, declared that the "exemption will apply only if *three* separate tests are met" (*id.* 12499) and that he wished "to discuss those *three* tests separately" (*id.* 12500). He took up first the two percentage tests and then the industry recognition test, concerning which he stated:

"Under the *third* test, any sale or service [absent a resale] * * * *will have to be treated by the Administrator* and courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as a retail sale or service" (*id.* 12502).

Petitioner claims that there are more than the three statutory tests of a retail establishment the first of which was listed in his brief before the Trial Court (p. 5) as

"1. The establishment must be engaged in making sales of goods or services or of both."

Here, the Government constantly speaks of "sale of services"—rather than performance—to indicate the difficulty of applying the exemption to most service establishments. Whether or not the statute may be so read as to apply "sale" to "goods" only and not to "services" (see p. 17, *supra*) it should be noted that the expression "sale of services" had its origin in the Administrator's own Bulletins when the statute spoke merely of "selling or service" (See 1941 W H Interpretative Bulletin).

Mr. Justice Frankfurter concluded that the exemption, as originally defined, could not be applied to the rental of space in a loft building not because of the absence of the concept of selling, but because such rental of space was not, as he put it, "the equivalent of selling services *to consumers*" (*Kirschbaum* v. *Walling*, 316 U. S. 517, 526, emphasis supplied).

Similar posing of semantic issues by asking what is being sold when a loan is made, by pointing out that money is not a commodity that can be consumed, or that there is an absence of a concept of resale in connection with the lending service (Pet. Br. pp. 8, 47, 49) is not helpful. If the purpose is to make the three tests unworkable, identical criticisms could be made with respect to the rental of hotel rooms, dance halls, funeral homes, crematories and other administratively recognized service establishments. It could be said with equal facility and equal immateriality that a funeral home's services do not constitute a commodity and it is difficult to conceive of the resale of the services rendered by a funeral home, dance hall or hotel room. Indeed, the absence of any possibility of resale only enhances the propriety of applying the retail exemption.

The idea that these semantic difficulties might be controlling hardly squares with the emphatic pronouncement to be found in the House and Senate Conference Reports that "any sale *or* service will have to be treated by the Admin-

istrator and courts as a retail sale *or* service, so long as such sale *or* service is recognized *in the particular industry* as retail sale *or* service" (95 Cong. Rec. 14931-2, 14877).

When inquiry was made by Senator Aiken as to the purpose of the words used in setting up the industry recognition test, this answer was given:

> "Mr. Holland: They make it very clear, crystal clear, that no one standard can apply to every type of business * * * the *Administrator and the courts, as well as the people who are in business, are warned that the rules prevailing in the business, the understanding of the term in the business, would apply,* with complete knowledge that the same understanding may not apply in different businesses, because the same standard or rule cannot at all be safely applied to all businesses" (*id.* 12510).

(5) *All establishments are eligible for the application of the statutory definition; personal loan companies are not credit companies.*

It is impossible to reconcile these positive legislative declarations with petitioner's allegation (Br. p. 6) "that there are some types of businesses which are not eligible for the Section 13(a)(2) exemption regardless of the amount or kind of evidence that might be adduced * * *."

Nor is petitioner's position supported by the legislative comment that "banks, insurance companies, credit companies * * *" (95 Cong. Rec. 12505) are not generally considered in a retail category—even if we were to assume that such comment would be controlling. The term "credit companies" is not the equivalent of "personal loan companies."

The Encyclopedia of Banking and Finance, in defining "credit company," refers the reader to "commercial credit companies" (R. 142). Messrs. Henderson, Neifeld and

Schmus testified that the term "credit companies" refers to "commercial credit companies" which make "loans available to business establishments" and that the term does not include personal loan companies which grant credit to individuals for consumption purposes (R. 141, 149). Mr. Schmus never understood or heard in his twenty-five years' experience "the term 'credit companies' as being applied to and descriptive of small, licensed, small loan companies" (R. 149, 150). Petitioner's witness Melnicoff, testified that he did not "recognize the term 'credit companies' as being one that is in general use * * *" (R. 157).

Certainly, "credit companies" was not used in an all inclusive sense so as to include all institutions which extend credit. Such recognized retailers as pawn shops, retail credit furniture stores, etc., also extend credit. Moreover, if "credit companies" were intended to be so all inclusive, why include them among "banks, insurance companies, credit companies etc." all of which extend credit.

And if the question respecting this group was put by a spokesman for the Administrator (95 Cong. Rec. 12505) in an effort to preserve his earlier classification of "personal loan companies", why the change from "personal loan companies" as used in the Administrator's pre-1949 ruling.*

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* The question put to Senator Holland, the substance of the answer to which found its way into the Conference Report, was as follows:

> "Q. Would the proposed amendment have the effect of exempting banks, insurance companies, *credit companies* * * * etc.?" (95 Cong. Rec. 12505.)

This lumping of "credit companies"—whose dictionary definition refers to "commercial credit companies"—with such recognized commercial lenders as "banks and insurance companies" would hardly suggest that the questioner was seeking a reply which would be applicable to personal loan companies

The proof in this case shows that however "credit companies" may be regarded, personal or small loan companies, as each of three Trial Judges has found, *are regarded as retail businesses in the financial industry.*

All of which demonstrates the danger of interpreting a statute whose language is plain and unambiguous, in terms of legislative comment especially where, as here, the comment itself is of doubtful meaning. Cf. *Gemsco, Inc.* v. *Walling,* 324 U. S. 244, 260.

(6) *The views of and in the particular industry are not to be rejected as self-serving.*

Petitioner would here give no weight to the views in or by the financial industry. The *Taylor Fertilizer* decision which criticized this position is summarily rejected by the petitioner as "erroneous" (Br. footnote pp. 33, 34). But note what the Senate Report says on this subject:

> "It is the intent of the conference agreement to place on each employer claiming the exemption the burden of showing that 75 percent of the particular establishment's sales are not for resale and are recognized as retail in the particular industry. It is expected that the Administrator will investigate the facts in particular industries and determine what sales are recognized as retail in such industries. While it is expected that the Administrator *will give due weight to the views of trade associations,* both in the wholesale and retail fields, the conference agreement does not contemplate that the *interpretation of any interested group should be regarded as controlling. Due weight should be given, for example, to the actual practice in the industry.* The soundness of the Administrator's conclusions may be *tested in the courts*" (95 Cong. Rec. 14877).

Petitioner objects to making industry recognition decisive because of the alleged impropriety of permitting an industry to make its own self-serving definition. Petitioner

is entirely incorrect in stating that "respondents' evidence relating to the 'industry recognition' test was of a self-generated and self-serving nature" (Br. p. 53). This can hardly be said of Schmus, the Cashier and Vice President of the First National Bank of Chicago, Dreibelbis, a Vice President of the Bankers Trust Company of New York or Leon Henderson. Dr. Neifeld wrote of wholesale and retail lending as early as 1933 (*supra*, p. 9).

Senator Aiken, too, asked whether the industry recognition test does not leave it

> "pretty wide open for an industry to determine for itself whether it is to come under the provisions or not" (*id.* 12510).

He was told:

> "* * * what constitutes a retail sale and what constitutes service * * * is defined variably in various industries by determining what are the habits and practices in the industry" (*id.* 12510).

As Judge Tuttle held in the *Taylor Fertilizer* case, 233 F. 2d 284, 288:

> "In the determination of what is recognized as retail in an industry, the opinion of industry members would be relevant, and the trial court did not err in basing its findings of fact upon their testimony."

On the method of applying the amendment, the House Sponsor had this to say:

> "Under the amendment *the courts would decide the question of what sales or services are recognized as retail in the particular industry.* An employer claiming exemption would have the burden of proving to the courts that in fact 75% of his sales or services are recognized as retail in his industry. * * * With respect to the third test [industry recognition] it should be

pointed out that the terms 'retail' and 'wholesale' are trade terms well known and commonly accepted in industry." (95 Cong. Rec. 11003-11004.)

And Senator Holland stated:

> "How better could the matter *be left* than by *recognizing the dividing line between retail sales and wholesale sales in the particular industry* of the thousands of industries which will be affected by this law, leaving to an able Administrator and the just courts to decide between citizens if any question arises?" (*id.* 12502).

When Senator Aiken called the industry recognition test "the joker in the amendment" (*id.* 12519), Senator Holland replied:

> "There is no proper background against which to determine the meaning of 'retail sales or services' without looking to see the meaning of the term 'retail sales' or the term 'retail services' in the particular industry which is affected."

Congressman Lucas made a similar comment (*id.* 11115-16).

Senator Taft gave this answer:

> "The senior Senator from Florida says that [the industry recognition test] would give the industries the right to decide the matter for themselves. It would not do so. Hardly an industry can be found in which the question of what is retail and what is wholesale has not been settled for years. It is a question of fact just as much as any other question of fact. It is a question of fact which we are perfectly able to determine" (*id.* 12515).

The "question of what is retail and what is wholesale" in the financial industry has been "settled for years" and, by reason of that fact, each of the three trial judges who has heard testimony on the subject has been constrained

to find that a small loan office is recognized in the financial industry as a retail service establishment.

Petitioner constantly reminds the courts that this Court has held that the Administrator's views are entitled to great weight. But such views must now—and here—be considered in light of the attitude displayed by the Administrator toward the 1949 Act both before and since its adoption.

The Administrator sought the adoption of the Lesinski Bill which would have confirmed his pre-1949 administrative interpretations *in toto*. He was defeated and the Lucas Bill, which he opposed, was adopted instead. Petitioner and the Administrator both act as though they had won the battle and they still insist that the pre-1949 administrative interpretations were confirmed and are controlling.

The Administrator opposed the Lucas Bill because it would "substitute a completely new set of definitions". It is now asserted that the amendment contains no binding definition and that the Administrator's "susceptibility" test must still be applied.

The Administrator objected to the adoption of the amendment because, as proposed, it would permit each industry to decide for itself what its status should be under the exemption. The rejection of this objection by Congress has not restrained the Administrator from offering exactly the same objection in the courts.

The Administrator objected to the adoption of the amendment with its new definition because it would add at least 200,000 previously non-exempt workers to the exempt group. The retort that that was due to the Administrator's incorrect pre-1949 interpretations does not deter the petitioner from asserting that the amendment was not intended to expand the number of businesses and workers previously held non-exempt.

It is this stubborn resistance on the part of the Administrator to the 1949 Act that has occasioned the need for court interpretation, not only in the three cases dealing with small loan offices, but also in other fields. See *Mitchell* v. *Taylor Fertilizer Works*, 233 F. 2d 284, *Boisseau* v. *Mitchell*, 218 F. 2d 734.

Compare comment of Chief Judge Magruder (former Solicitor of the Labor Department), respecting the Administrator's attitude toward the Belo amendment: "From the start the Administrator of the Wage and Hour Division has disliked the Belo decision and has sought to whittle it down * * *" and though "the new §7(e) [of the 1949 Act] is undoubtedly applicable, if we understand appellant's [petitioner's] contention we are to decide this case just as though §7(e) had not been enacted * * *" *Mitchell* v. *Brandtjen & Kluge, Inc.*, 228 F. 2d 291, 294-5.

CONCLUSION

However we may admire the Administrator's tenacity and singleness of purpose—to expand the application of the Act—he should not be further encouraged in his effort to attain in the courts that which Congress has refused him.

The most that can be said respecting the "legislative materials" upon which the petitioner so heavily relies, is that there are comments which run counter to the plainly expressed terms of the statute as well as to the sponsors' expressions of intent above set forth. The Court of Appeals, therefore, was fully justified in applying the exemption as written.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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